Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ANGEL C. LOPEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a sentencing court, pursuant to the Federal Sentencing Guidelines, may properly calculate a victim's loss, by holding the Defendant responsible for an estimated Co-Defendant's gain?

2. Whether it is a violation of the Ex Post Facto Clause of the United States Constitution, Article I, Section 9, Clause 3, to apply the Mandatory Victim Restitution Act to the Defendant's conduct, which occurred six or more years prior to the effective date of the Act?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on August 17, 2000.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at ___ F.3d ___ (7th Cir. 2000). A copy of the opinion is included in the Appendix.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. §1254(1) for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. Petitioner in the District Court and in the Court of Appeals asserted Federal claims based on the United States Constitution and interpretations of the United States Federal Sentencing Guidelines. A written opinion was issued by that Court on August 17, 2000. Petitioner sought rehearing, which the Court denied on October 6, 2000.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of 18 U.S.C. §3663A and the Ex Post Facto Clause to Article I, Section 9 of the United States Constitution are set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner was the president of a credit union, Credit Union 1 (hereinafter referred to as "CU1") based in Rantoul, Illinois. Along with the Chairman of the Board of Directors of CU1, Richard Binet (hereinafter referred to as "Binet"), Petitioner was charged and plead guilty to a Federal conspiracy offense in an indictment in the Central District of Illinois, in violation of 18 U.S.C. §371. The two executives were simultaneously employed at CU1 throughout the 1980's. As members of the Board, each was enjoined to eschew personal profit from service on the Board, to the credit union, except for Petitioner's salary as President. The men were indicted in 1997 for fraudulent conduct that occurred between 1983 and 1992.

CU1 was governed by a Board of Directors that over time was handpicked by the Petitioner and Binet and which provided no real oversight to their operations. Nevertheless, the credit union was quite successful, and with its growth and success, both Petitioner and Binet enjoyed personal financial opportunities. Binet, relying upon Petitioner's assistance, created several companies that did ancillary work for the credit union membership,

including travel (CU Travel), insurance (CUSI) and advertising (Hana Advertising). In each instance, Binet personally profited by consultant payments that were approved by the Board or by Petitioner, without direct Board approval. In the end, Binet received benefits amounting to personal compensation of approximately $400,000. He was also provided one new automobiles during his tenure.

Petitioner enjoyed a stable working relationship and lucrative contractual compensation. Because he wanted job security and had no retirement benefits, he negotiated a contract with the Board (headed by Binet) that guaranteed a pension of 50% of his highest salary for ten years, after ten years of service, and prevented the Board from discharging him, even for negligent fiduciary or regulatory violations. When auditors criticized the contract, Petitioner negotiated a $530,000 lump sum buy-out of the contract. Petitioner also was assigned the value of a "key man" life insurance policy on his own life that was owned by the credit union.

Utilizing the assets of the credit union, Binet recommended and managed an investment portfolio for the Board that consisted of highly sophisticated collateralized mortgage obligations (described as "CMO's" and "CMOR's"). Binet made himself indispensable to the credit union because no one understood the investments except him. Petitioner supported Binet's activities and Binet supported Petitioner. When the deposit insurer for the credit union (National Credit Union Share Insurance Fund, "NCUSIF") demanded that CU1 divest itself of the CMO's and CMOR's, the two men agreed that CU1 would

instead, divest itself of the insurer. They organized publicity informing the membership that private share insurance was better for the credit union, when in fact, the motivation was to avoid the investment divestiture order. When the new insurance company (American Share Insurance, "ASI") was in place, however, ASI and the Illinois Department of Financial Institutions still commanded divestiture and eventually removed Petitioner, Binet and the rest of the Board from office in March 1992.

Sometime in 1988, Binet purchased a CMO using credit union funds ($8.8 million), acting through a company he had organized, CU Mortgage, Inc. He later sold the investment, returning the credit union funds, and in fact returning a profit of approximately $78,000 to the credit union. He kept as his personal gain an amount of funds that he later, at Petitioner's sentencing hearing, estimated to be at least $800,000 to $1,000,000. He had no documents to support this amount of his personal gain, nor any records to support his claim that Petitioner was a joint venturer in the CMO scheme. Petitioner denied any role in the scheme, noting to Federal investigators during his proffer that Binet had mentioned the proposed CMO scheme to him and that Petitioner had declined any involvement. It was undisputed that Petitioner received no proceeds from Binet's CMO scheme.

Following their convictions, Petitioner and Binet were the subject of sentencing hearings with Binet being the chief government witness against Petitioner. Binet was the beneficiary of a government departure motion under §5K1.1 of the Federal Sentencing Guidelines based on his testimony and cooperation with the government. Petitioner had proffered assistance to the government as

well, but his sentencing entreaties were rejected by prosecutors. All credibility questions were resolved in the District Court in favor of Binet and against Petitioner.

Pursuant to §2F1.1 of the Guidelines, the District Court determined the amount of loss attributable to the Petitioner to include $600,000 based on the gain to Binet in the 1988 CMO transaction. Petitioner's objection that this enhancement was improper because there was no loss to the credit union, and in fact a profit, was rejected by the District Court. Petitioner was sentenced to 38 months imprisonment. Additionally, the District Court determined a restitution amount of in excess of $1,000,000, and ordered payment by Petitioner under the provisions of the Mandatory Victim Restitution Act, 18 U.S.C. §3663A, regardless of Petitioner's inability to pay restitution. The MVRA was enacted by Congress to be effective in 1996. Petitioner's Constitutional claim that application of the MVRA to his case violated the Ex Post Facto Clause of the United States Constitution was likewise rejected by the District Court.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit and raised both Federal issues. As to both the loss enhancement and restitution issues, Petitioner pointed to the split of authority with other Circuit Courts of Appeal. Nonetheless, a panel of the Seventh Circuit Court of Appeals rejected Petitioner's claims and affirmed the District Court. Petitioner's timely filed Petition for Rehearing *en banc* was also denied.

REASONS FOR GRANTING THE WRIT

There is a significant split in the holdings of the United States Circuit Courts of Appeals on the issue of "gain for loss" where no loss is shown, and on the issue of the ex post facto application of the Mandatory Victim Restitution Act as punishment in a Sentencing Order.

This case presents two important issues for this Court to address regarding a conflict among the Circuit Courts of Appeal over two recurring sentencing issues.

1. Sentence Enhancement Based on Gain

First, with respect to "gain for loss", the United States Sentencing Commission has determined a methodology of sentence enhancements in cases, like this one, involving fraudulent conduct where the seriousness of the crime is enhanced by the amount of loss caused by the fraud of the defendant (see §2F1.1(b)), or in some instances, loss caused by a co-defendant (see United States Sentencing Guidelines, §1B1.3(a)(1)). What of the circumstance, however, when the victim sustains no loss from the defendant's or co-defendant's fraudulent conduct, and, in fact, receives a gain?

The panel opinion of the Seventh Circuit in this case recognized "gain as substitute for loss", relying on §2F1.1 Comment N.8 of the 1989 Guidelines that "the offenders' gross gain from committing the fraud is an alternative estimate that ordinarily will understate the loss" and that the Section allows the defendants' gain to be used as a basis for calculating an approximate loss, will understate the loss. The Court reasoned, relying on Seventh Circuit

authority, that a defendant's gain could provide an estimate of an appropriate loss when the exact amount of loss is not available. *U.S. v. Anderson*, 45 F.3d 217, 221 (7th Cir. 1995).

The difficulty with the Seventh Circuit opinion and panel analysis is that it is assumes that a sentencing court must turn to a gain where a loss is not capable of identification. Other Circuits have addressed this issue and determined that where there is no loss, there should be no sentencing enhancement pursuant to §2F1.1 Loss Table. Thus, in the *U.S. v. Marcus*, 82 F.3d 606, 608 (4th Cir. 1996), the Court noted "gain, measured either by gross sales or some other gauge, does not support a loss enhancement under §2F1.1(b) if there was no actual, probable or intended loss to the victims." Again, in *U.S. v. Galbraith*, 20 F.3d 1054, 1060 (10th Cir. 1994), *cert. denied*, 513 U.S. 889 (1994) the Court noted that "the defendant's gain may be used only as alternate estimate of that loss; it may not support an enhancement on its own if there is no actual or intended loss to the victims."

The Seventh Circuit's misinterpretation of "gain" as a substitute for "loss" is further exacerbated by the use of sentencing conspiracy theory. Under §1B1.3(a)(1) Petitioner could be held responsible for losses occasioned by Co-Defendant Binet, reasonably foreseeable as part of a conspiratorial agreement. However, to use a gain obtained by Binet, where there is no loss to the Credit Union, and in fact a $78,000 profit, is to exalt form over substance and to provide for a sentencing enhancement not proved by the Government, based on loss. Indeed, the Seventh Circuit holding is not only contrary to the law of other Circuits, it is also contrary to other case holdings in

the Seventh Circuit. (See *U.S. v. Viteck Supply Corp*, 144 F.3d 476, 490 (7th Cir. 1998), *cert. denied*, 525 U.S. 1138 (1999)) Applied to the present case, the contrary Circuit authority would reduce Petitioner's sentencing level by 3 points under §2F1.1.

This Court should grant certiorari to review the "gain as a substitute for loss" issue and resolve the conflict amongst the Circuit Courts of Appeals.

2. Ex Post Facto Application of Mandatory Victim Restitution Act 18 U.S.C. §3663A

The second recurring issue deals with the impact of the Mandatory Victim Restitution Act. The MVRA [Mandatory Victim Restitution Act] 18 U.S.C. §3663A et seq. mandates that the District Court order a defendant to pay restitution without taking into consideration the defendant's ability to pay. Although the split in Circuits was pointed out to the Seventh Circuit, the panel adhered to a prior stated view of the Seventh Circuit Court of Appeals that the MVRA posed no ex post facto dilemma because restitution did not equate to "punishment" as prohibited by the Ex Post Facto Clause to Article I, Section 9 of the United States Constitution. (See *U.S. v. Newman*, 144 F.3d 531, 537 (7th Cir. 1998)) Other Circuits hold in direct contradiction of the Seventh Circuit's position in Petitioner's case. (See *U.S. v. Rutgard*, 116 F.3d 1270, 1294 (9th Cir. 1997) "the substantive change in the criminal law cannot be applied retroactively without violation of Ex Post Facto Clause of the United States Constitution."; *U.S. v. Richards*, 204 F.3d 177, 213 (5th Cir. 2000), *cert. denied* as *Braugh v. United States*, ___ U.S. ___, 121 S.Ct. 73

(2000), "by requiring the court to order restitution in the full amount of loss, without considering the defendant's ability to pay, the MVRA increases the severity of the punishment a defendant faces as compared to the pre-amendment [statute]"; *U.S. v. Edwards*, 162 F.3d 87 (3rd Cir. 1998) "we find that under the MVRA, restitution is punishment, and that the retrospective application of the punishment to Edwards under the facts of this case is a violation of the Ex Post Facto Clause and plain error"; *U.S. v. Siegel*, 153 F.3d 1256, 1260 (11th Cir. 1998) "we hold that the MVRA cannot be applied to a person whose criminal conduct occurred prior to April 24, 1996").

Creating a financial disadvantage for the defendant at a sentencing hearing, without regard to his financial circumstances, is certainly "punishment". The varied holdings of the listed Circuit Courts of Appeal accepts this Constitutional concept and prohibits retroactive application of MVRA. It is Constitutionally significant that a defendant's sentencing order not vary from Circuit to Circuit. This Court should grant certiorari to address and resolve the conflict between the Seventh Circuit opinion and other Circuits

CONCLUSION

In its opinion below, the Seventh Circuit Court of Appeals improperly affirmed the District Court's sentencing orders against the Petitioner. The Seventh Circuit's flawed analysis caused the Court to create a new "gain as a substitute for loss" category of fraud sentencing. Its Order also retroactively applied mandatory restitution

provisions of the Mandatory Victim Restitution Act to the Petitioner whose conduct occurred six years prior to the enactment and in fact effective date of the statute. Accordingly, this case presents significant issues worthy of this Court's consideration. Certiorari should be granted to review and reverse the holding of the Seventh Circuit Court of Appeals.

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January 2001

In the

United States Court of Appeals,
for the Seventh Circuit

No. 99-1724

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANGEL C. LOPEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois
No. 97 CR 20014 – **Michael M. Mihm,** *Judge.*

ARGUED OCTOBER 27, 1999 – DECIDED AUGUST 17, 2000

Before FLAUM, *Chief Judge,* HARLINGTON WOOD, JR. and EVANS, *Circuit Judges.*

HARLINGTON WOOD, JR., *Circuit Judge.* Angel Lopez ("Lopez") pleaded guilty to conspiracy to embezzle and misapply credit union funds and conspiracy to execute a scheme to defraud. Lopez was sentenced to thirty-eight months in prison and to pay restitution in the amount of $1,029,867. Lopez challenges the sentencing determination and the amount of restitution. We affirm.

I. BACKGROUND

It is necessary to try to unravel the convoluted and complicated transactions involved. Credit Union One ("CU1") was a state-regulated credit union incorporated under the laws of Illinois, but also falling within the regulatory authority of the National Credit Union Administration ("NCUA"), which organizes and approves federal credit unions. CU1 was federally insured by the National Credit Union Share Insurance Fund ("NCUSIF").

Lopez graduated from high school and began working in the financial field in 1959. He was hired by CU1 in 1976 as assistant general manager. He was promoted to general manager in 1978. In 1979, his title was changed to president. Less than a year later, Lopez became a member of CU1's board of directors. All board members were required to sign an oath of fiduciary duty to act in the best interests of the credit union and to consider the interests of the credit union before their own personal interests. Board members were to receive no compensation for their services, other than reasonable and necessary reimbursement for expenses incurred while on official credit union business. The board of directors provided oversight and direction for the operation of the credit union, with the primary goal of offering high savings rates. To offset the higher savings rate, CU1 charged higher interest rates on loans. Unfortunately, this left a large pool of tempting cash.

Richard Binet ("Binet") was CU1's chairman of the board throughout Lopez's employment. Binet managed an investment portfolio of approximately $82 million on a

yearly average from 1986 to early 1990. Lopez testified that he and Binet did not sit down and form an elaborate plan on how they would defraud CU1; it was basically an arrangement where Lopez and others supported Binet's actions and were consequentially rewarded by Binet. Lopez stated that anyone who objected to Binet's activity was quickly removed from the board. During his tenure as president, Lopez authorized at least $400,299 in direct and indirect consulting fees to Binet, in addition to authorizing CU1 purchases of two automobiles for Binet at a total cost of $40,644.

Binet had CU1's board contract with CUSI, Ltd., a corporation formed by Binet, which received payments totaling approximately $17,000 authorized by Lopez. According to Binet, the services CUSI was to provide were illusory and of no value. Lopez was also an officer of CUSI. After CUSI stopped receiving money for Binet, he created Credit Union Management, Inc. to receive CU1 money for his benefit.

Binet also had CU1 create a travel agency known as CU1 Travel. Lopez was listed as the "owner" of CU1 Travel and his wife as manager. Following an audit by Deloitte & Touche in 1989, travel agency losses of $141,231 were listed for 1988 and subsidiary losses of $25,539 for 1989.

Binet, after complaining to the board about the marketing efforts being made on CU1's behalf, proposed that Hana Advertising Associates, Inc. be given the marketing contract for CU1. The board agreed. During interviews with the FBI, after making a proffer (use immunity) agreement, Lopez stated that he knew Binet owned

numerous companies, but that he (Lopez) was not involved in any of the companies. Although Lopez stated that "he had no involvement with a company called . . . Hanah [sic]," Hana Advertising was incorporated under the laws of Illinois with Binet listed as president and Lopez as a director. Without the board's knowledge or approval, Lopez ordered checks totaling approximately $230,000 to be issued to Hana Advertising from 1986 to 1987.[1] Lopez stated that he signed the contract and approved the checks to Binet because "that [wa]s the way Binet wanted it," and that Lopez's relationship with the board was basically, "You scratch my back, I'll scratch yours." Lopez stated that if Binet left, Lopez knew his lucrative compensation package[2] would be "seriously reduced."

Lopez also stated that he knew Binet owned or controlled a company called Innovo, but did not admit to any involvement with that company either. However, Lopez later admitted to owning a substantial amount of stock in Innovo Group Inc., which was owned by Binet. Innovo received a contract from CU1 in order to expedite the

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[1] Although several checks were issued in 1986, the marketing contract was signed on May 16, 1987 and terminated in December 1987. According to Lopez's testimony, Binet instructed Lopez to use the name Hana Advertising on the 1986 checks for Binet's "work performed," even though Binet had not yet created the contract using Hana Advertising's name. However, Lopez testified that the checks had actually been written to Binet, but the IRS 1099 forms were issued in the name of Hana Advertising.

[2] Lopez's W2 form for 1989 listed $182,727 as his annual salary.

purchase of plastic bags. Lopez eventually sold his shares in Innovo, making a net profit of approximately $100,000. Lopez also facilitated a CU1 loan of approximately $100,000 to Innovo, which was never paid back.

Having worked without a contract since 1976, and being concerned about a retirement plan, in 1984 Lopez had his lawyer prepare an employment contract which included a provision allowing Lopez to retire after ten years of employment. If Lopez exercised the retirement option, the contract required CU1 to hire Lopez for a period of not less than ten years as a "special consultant" at an annual salary equal to fifty percent of his highest annual salary earned while president of CU1. The contract was self-renewing every five years and specified Lopez could not be terminated for "negligent or inadvertent omissions or violations of regulatory rules or laws." The board never reviewed or discussed this contract. Under Binet's direction, the contract was bought out in 1988 for $580,000, which the government argued was approximately $300,000 more than its true value.

Lopez also stated that dealing with Binet became a necessity after Binet decided that CU1 should invest in collateralized mortgage obligations ("CMOs")[3] and collateralized mortgage obligation residuals ("CMORs").[4]

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[3] According to BARRON'S BUSINESS GUIDE DICTIONARY OF BANKING TERMS 127-28 (Thomas P. Fitch et al. eds., 1990), a CMO is a:

> mortgage-backed bond secured by the cash flow of a pool of mortgages. In a CMO, the regular principal and interest payments made by borrowers are separated into different payment streams, creating several bonds that repay invested capital at different

Both Lopez and Binet stated that Binet was the only person at CU1 who had any knowledge of CMOs/CMORs and that they and the board did not want to hire an outside consultant who might recommend needless transactions in order to increase commissions. Lopez authorized payments to Binet as an investment advisor in the amounts of $78,000 for 1988 and $45,500 for 1989.

Although Lopez continually denied awareness of or participation in a CMOR transaction with Binet for personal profit, Binet stated that in February 1988, he and Lopez used $8.8 million of CU1 money to purchase a CMOR, with CU1 owning eighty percent of the investment and Lopez and Binet owning twenty percent. Binet

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> rates. . . . A CMO pays the bondholder on a schedule that differs from the mortgage pool as a whole, and includes fast pay, medium pay, and slow pay bonds to suit the needs of different investors. The common arrangements include: a fast-pay bond with a maturity much shorter than the total pool; a bond paying interest only for a period that may be fixed or contingent on how prior CMOs perform, before payment of principal begins; and a bond paying variable interest based on an index. . . . Fast paying bonds appeal mostly to savings and loans seeking short-term liquidity investments, whereas longer-term CMOs appeal to the investment needs of pension funds and institutional investors. . . .

[4] BARRON'S BUSINESS GUIDE DICTIONARY OF BANKING TERMS 524, states that a CMO residual is:

> cash flow resulting from the difference between the income stream generated by a pool of mortgages and the cash flow necessary to fund a series of collateralized mortgage obligation bonds. Also known as equity.

stated the CMOR was sold for a $1 million gain. He also testified that he had destroyed a fax from Lopez on June 6, 1988, which showed a portion of the money being returned to CU1. Lopez received part of his profits in the form of a "deferred compensation" payment of $250,000 orchestrated by Binet, and through the transfer of a universal life program insurance policy for Lopez which Binet had CU1 purchase in 1986. The policy, known as a "key man" policy, insured that if Lopez died, CU1 would own the cash flow from the policy. According to Binet, he had the ownership of the policy changed from CU1 to Lopez and Lopez was able to redeem the policy for a cash value of $265,000.

In February 1989, Lopez received notice that NCUA was going to conduct a review of CU1 in connection with CU1's status as an insured of the NCUSIF. NCUA has mandatory regulations concerning the buying and selling of CMOs and CMORs. As one of NCUSIF's insureds, CU1 had agreed to follow the NCUA regulations. After the review, NCUA notified Lopez of numerous concerns regarding the fact that CU1 had nearly fifty percent of its assets invested in CMOs/CMORs. CU1 agreed to sell fifty percent of the CMO/CMOR investments by December 31, 1989, and agreed to dispose of the remaining fifty percent by the following year. However, Binet and Lopez decided to seek private insurance in order to distance CU1 from NCUA examinations and federal regulations. Presented as a money-saving step, the board voted to terminate its share insurance with NCUA and sought private share insurance coverage with the National Deposit Insurance Corporation (now known as "ASI"). On February 11, 1990, the insurance conversion became effective and CU1

was relieved of its obligation to comply with NCUA's requirements.

During a joint examination of CU1 by ASI and the Illinois Department of Financial Institutions ("DFI") in February 1991, it was noted that CU1 was not acting on divesting the CMOs/CMORs. As a result, CU1 entered into a Letter of Understanding and Agreement with the DFI and ASI promising to engage a portfolio manager to assist in the pricing and sales of all the CMOs/CMORs and immediately cease payment of all compensation to the board of directors. Lopez admitted he provided false information to the DFI regulators about the CMOs/CMORs.

Lopez was removed as president and as a director of CU1 in 1992 following an investigation by the DFI. On February 14, 1997, Lopez signed a proffer agreement which granted him use immunity for any information he provided which was relevant to the criminal activity engaged in while at CU1. Lopez was interviewed by government agents for three days and also assisted the government in locating and arresting Binet. On December 29, 1997, Lopez signed a plea agreement and on January 5, 1998, reviewed the plea agreement before the district court and pleaded guilty to conspiracy to embezzle and misapply funds belonging to CU1 and conspiracy to execute a scheme to defraud.

The court's sentencing calculations for fraud began with a base offense level of 6 under § 2F1.1(a) of the 1989 United States Sentencing Guidelines ("U.S.S.G." or the

"Guidelines"),[5] with an 11 level increase incurred for a loss of $1,051,043.[6] U.S.S.G. § 2F1.1(b)(1)(L). Additional increases were applied as follows: 2 levels for more than minimal planning, U.S.S.G. § 2F1.1(b)(2)(A); 2 levels for abuse of a position of public or private trust and use of his position which "significantly facilitated the commission or concealment of the offense", § 3B1.3; and 2 levels for obstruction of justice when testifying untruthfully before the grand jury about the CMOR, § 3C1.1 comment. n. 1(c). These additions created an adjusted offense level of 23. A 2 level downward adjustment for acceptance of responsibility under § 3E1.1 comment. n. 4, was also made, which resulted in a total offense level of 21. With no prior criminal history, Lopez's Guideline range for sentencing was thirty-seven to forty-six months. U.S.S.G. § 5A. The district court sentenced Lopez to thirty-eight months incarceration, and, under the Mandatory Victim Restitution Act of 1996 ("MVRA"), ordered restitution to CU1 in the amount of $1,029,867.[7]

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[5] The record states that the 1989 edition of the Guidelines has been used to compute sentencing for the crimes, which were committed from July 1984 through February 1990.

[6] The figure was derived from: profit from contract buyout-$37,000; CMOR-$600,000; overpayment to Binet through CUSI-$17,000; overpayment to Binet through Hana Advertising-$230,799; direct payments to Binet-$78,000 and $45,500; bonuses paid to CU1 employees-$36,000; and purchase of cars for Binet-$40,644, totaling $1,130,943, less an offset for the value of Binet's services rendered to CU1 as determined by the district court to be $79,900, resulting in a final total of $1,051,043.

[7] This amount was derived from the $1,051,043 total, less an offset of $21,176 for the trade-in and resale value of the two cars purchased for Binet.

Lopez contends that the district court erred on eight issues: (1) by violating the immunity proffer to enhance Lopez's sentence, (2) by enhancing his sentence for obstruction of justice, (3) by using gain to Binet as a substitute for loss where there was no loss to the victim, (4) by basing the estimated gain on unreliable and contradictory evidence, (5) by determining an arbitrary value for services rendered by Binet, (6) by failing to reduce the Guideline losses by the value of the cars recovered by CU1, (7) by enhancing the loss figure with bonuses paid to certain CU1 employees, and (8) by violating the Ex Post Facto Clause in applying the MVRA.

II. ANALYSIS

A. Violation of Immunity Agreement

Lopez argues that the February 1997 proffer agreement providing use immunity prohibited the district court from using any information about the personal CMOR transaction in Lopez's sentencing. The terms of the immunity agreement provide:

> [N]o statement made or information provided by [Lopez] pursuant to this agreement may be used directly against your client in any criminal case, including sentencing. . . . [Lopez] will provide *complete* and *truthful* information . . . regarding his criminal conduct and everything he knows or has reason to believe about the criminal conduct of others. . . . Should [Lopez] knowingly make any materially false statement or omission in providing information under this agreement, the government will be entitled to use his statements and evidence he provides

> directly to institute and support a criminal prosecution for any offense as well as a prosecution for giving false statements and perjury. . . . [Lopez] must neither conceal or minimize his own actions or involvement in any offense, nor conceal, minimize, fabricate, or exaggerate anyone else's action or involvement in any offense. He must be completely truthful about the facts whatever those may be.

(Emphasis in original.)

After signing the proffer, Lopez testified before government agents and the grand jury that Binet supervised the CMO/CMOR investments for CU1. He stated that when Binet approached him to purchase a CMOR with CU1's money for their own profit, he refused to participate in such an action and had no idea if Binet ever did so. Binet later testified that he and Lopez made such an investment, that Binet had had records of Lopez's participation which he had since destroyed, and that Lopez personally benefitted from the transaction. In addition, Lopez failed to mention the fact that he had conspired to alter the minutes of the board meetings, although the minutes were discussed with the government and Lopez knew the government was relying on the minutes in its investigation.

"As a contract, a proffer agreement must be enforced according to its terms." *United States v. Cobblah*, 118 F.3d 549, 551 (7th Cir.1997) (citation omitted). As in *Cobblah*, the proffer "contract" obligated Lopez to give statements that were entirely truthful. *See id.* The proffer emphasized that Lopez should not seek to conceal or minimize his own actions in the offenses involved and clearly stated

that any false statements or omissions could then be used against him. Given the language of the proffer, the government was within its rights to consider the proffer agreement had been voided due to Lopez's omissions concerning the CMOR and the alteration of the minutes. *See id.* We cannot say the district court erred in its determination that the government had established, by a preponderance of the evidence, that Lopez did know about the CMOR used for his and Binet's personal profit and that Lopez concealed the fact that he and others changed the board minutes. *See id.* Lopez violated the terms of the proffer, making it unenforceable.

Furthermore, in his plea agreement, signed December 29, 1997, ten months after the proffer, Lopez admitted to the following:

> On April 20, 1988, the defendant and Richard Binet caused $8.8 million of CU1 funds to be used to purchase a CMO residual with CU1 owning 80% of the investment and the defendant and Binet owning 20% of said investment. Said use of CU1 funds was never made known to the Board of Directors and the defendant knew that individuals were not entitled to own REMIC[8] investments. When said investment

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[8] A real estate mortgage investment conduit ("REMIC") is a "mortgage securities vehicle authorized by the Tax Reform Act of 1986 that holds commercial and residential mortgages in trust, and issues securities representing an undivided interest in these mortgages. . . . similar to a collateralized mortgage obligation (CMO). . . . " BARRON'S BUSINESS GUIDE DICTIONARY OF BANKING TERMS 497. Most of the parties involved in the case did not understand the exact nature of each of the investments involved and tended to use CMO, CMOR, and REMIC interchangeably.

> was sold for a $1 million gain, the defendant knew that the benefit was not provided to CU1. The defendant himself did not take any of these funds directly but benefitted from a $250,000 cash payment under the heading of Deferred Compensation Plan. Further, the defendant benefitted when a life insurance policy which had originally been purchased by CU1 as a key-man policy, beneficiary of which was to be CU1, was transferred to him personally.

Lopez also admitted in the plea agreement that he conspired to alter the minutes of the board meetings. The plea agreement also stated that the government was requesting a 2 level enhancement for obstruction of justice, based on Lopez's failure to fully disclose the CMOR transaction and his failure to disclose alteration of the minutes.

Lopez discussed the terms of the plea agreement with the district court at the plea hearing. Lopez stated that the plea agreement represented "every understanding" he had with the government and that he understood the terms of the plea agreement. Lopez cannot invoke the proffer after agreeing to the admissions and terms set forth in the plea agreement.

B. Obstruction of Justice

The Guidelines provide for an increase of 2 levels if the offender obstructed justice during the investigation or

prosecution of his offense. U.S.S.G. § 3C1.1.[9] The plea agreement states that "[p]ursuant to § 3C1.1, the defendant may receive 2 points for obstructing or impeding the administration of justice during the investigation or prosecution of the instant offense. . . . " More specifically, the plea agreement notes that because Lopez admitted his guilt after being confronted with evidence that he caused the minutes to be altered, he would fall into a sentencing category under § 3E1.1 comment. n. 4, which allows for both an obstruction of justice and an acceptance of responsibility adjustment to be applied. Lopez also admitted in the plea agreement to knowledge of the CMOR transaction Binet engineered and to receiving personal benefits from the profits of that transaction.

"To establish an obstruction of justice, the sentencing court must make an independent factual finding that the defendant engaged in a willfull attempt to provide false testimony." *United States v. Sinclair*, 74 F.3d 753, 762 (7th Cir. 1996) (citing *United States v. Dunnigan*, 507 U.S. 87, 93-96 (1993)). This finding may be reversed only if clearly erroneous. *Id.* (citation omitted). Based on the evidence of Lopez and Binet's intertwined dealings, the substantial amounts of money funneled to Lopez, and the testimony of Binet about both the minutes and the CMOR, the court determined that Lopez had willfully withheld information about material facts. The court stated, "I . . . believe there were things you didn't tell them that you were

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[9] U.S.S.G. § 3C1.1 (1989) states, "If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels."

aware of and should have told them and didn't until they were discovered somewhere else. . . . " Given these findings, we cannot say the district court's conclusion that Lopez's testimony was intentionally withheld, and not the result of confusion, mistake, or faulty memory, was clearly erroneous. *See id.* Moreover, because the district court recognized this finding was a factual determination based in large part on an issue of credibility, such credibility determinations "can virtually never be clear error." *United States v. Hickok*, 77 F.3d 992, 1007 (7th Cir. 1996) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985)); *see also United States v. Fiore*, 178 F.3d 917, 924 (7th Cir. 1999). We also note that the court's enhancement for obstruction of justice is not incompatible with a reduction for acceptance of responsibility. *See United States v. Buckley*, 192 F.3d 708, 711 (7th Cir. 1999); *United States v. Ramunno*, 133 F.3d 476, 480 (7th Cir. 1998); *United States v. Lallemand*, 989 F.2d 936, 938 (7th Cir. 1993).

C. Gain as Substitute for Loss

Lopez argues the district court erred in using the estimated profit made on the CMOR transaction by his co-conspirator Binet towards Lopez's sentence, even though the court determined that there was no "actual loss" to CU1 because the $8.8 million "borrowed" from CU1 was returned, albeit with some (but not all) profit made on the transaction. Lopez refers us to Application Note 8(b) to U.S.S.G. § 2F1.1 which, he asserts, provides that a loss figure should be reduced "by the amount the lending institution has recovered or can expect to

recover." There is no such language in the 1989 Guidelines. This section first appears in the 1991 Guidelines, § 2F1.1 comment. n. 7(b), which deals specifically with fraudulent loan application and contract procurement cases, and pertains to a defendant who understates debt information to obtain a loan.[10] There is no language in § 2F1.1 of the 1989 Guidelines which requires the district court to offset the amount of loss, although comment. n. 10 does allow for consideration that a total dollar loss may overstate the seriousness of a crime when "understating debts to a limited degree in order to obtain a substantial loan which the defendant genuinely expected to repay. . . . " However, this language is not applicable to the instant case, where Binet and Lopez did not manufacture a "fraudulent loan" scheme but simply took and used CU1's money outright.

Under § 2F1.1 comment. n. 8 of the 1989 Guidelines, "The offender's gross gain from committing the fraud is an alternative estimate that ordinarily will understate the loss." Section 2F1.1 "allow[s] the defendants' gain to be used as a basis for calculating an approximate loss when evidence of the exact amount of loss is not available." *United States v. Andersen*, 45 F.3d 217, 221 (7th Cir. 1995).

While the meaning of loss under § 2F1.1 presents a question of law subject to *de novo* review, *United States v. Holiusa*, 13 F.3d 1043, 1045 (7th Cir. 1994), the district court's finding on the amount of loss is reviewed for clear

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[10] This language appears in § 2F1.1 comment. n. 8(b), of the most current Guidelines (1998).

error only. *United States v. Dillard*, 43 F.3d 299, 309 (7th Cir. 1999).

Lopez argues that because the $8.8 million was returned to CU1, there was no loss. He does not deny the misapplication of funds for the CMOR occurred. Lopez also maintains that because Binet supervised and benefitted the most from the transaction, he should not be held accountable for Binet's gain. Lopez admitted in his plea agreement that he conspired with Binet to embezzle, misapply, and defraud funds from CU1. Section 1B1.3 comment. n. 1, states:

> In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would be otherwise accountable" also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant.

Binet testified this particular CMOR transaction was purportedly made on behalf of CU1, but that twenty percent of the profit was to go to Lopez and to him. He also testified that Lopez was involved in helping to transfer and receive the monies. The transfer of $8.8 million of CU1 funds was documented by the government. Therefore, any estimated profit which Binet made on the investment was correctly determined to be a loss to CU1. Binet's profit from this particular transaction would not have been realized without his illegal use of CU1's funds. *See United States v. Marvin*, 28 F.3d 663, 665 (7th Cir. 1994). The profits were "intertwined with and an ingredient of [defendant]'s overall fraudulent scheme." *See id.* Additional punishment is merited where sufficient evidence

provides for determination of monetary loss. *See United States v. Schneider*, 930 F.2d 555, 559 (7th Cir. 1991).

The district court did not clearly err, based on Binet's statements that Lopez was involved in this particular CMOR transaction, and Binet's testimony, along with Lopez's testimony and evidence in the record concerning benefits received by Lopez, in determining that the estimated profit from the CMOR transaction should be applied as a factor in Lopez's sentencing.

D. Estimated Gain Based on Unreliable Evidence

"Generally, the defendant's gain may provide a reasonable approximation of a victim's loss, and may be used when more precise means of measuring loss are unavailable." *Andersen*, 45 F.3d at 221. The amount of loss sustained by a victim must be established by a preponderance of the evidence. 18 U.S.C. § 3664(d). In determining a sentence under the Guidelines, the court has an "obligation to employ fair procedures to determine the accuracy of information used in sentencing." *United States v. Franz*, 886 F.2d 973, 980 (7th Cir. 1989); *see also United States v. Agyemang*, 876 F.2d 1264, 1270 (7th Cir. 1989). "[T]he court properly discharge[s] its obligation under § 2F1.1 of the Sentencing Guidelines by reducing the available information to a 'reasonable estimate' of the loss." *United States v. Haddon*, 927 F.2d 942, 952 (7th Cir. 1991); U.S.S.G. § 2F1.1 comment. n. 8. "Every factual inaccuracy does not amount to a constitutional violation." *Franz*, 886 F.2d at 980 (citations omitted). The burden of proof on appealing a district court's loss calculation requires the defendant to show that the determination

"was not only inaccurate but outside the realm of permissible computations." *United States v. Hassan*, 211 F.3d 380, 383 (7th Cir. 2000) (quoting *United States v. Jackson*, 25 F.3d 327, 330 (6th Cir. 1994)).

Based on calculations from incomplete documentation concerning the CMOR transaction,[11] Binet stated that he believed he, through his company, Credit Union Mortgage, had received $1,360,000. He said, "I don't know the exact amount, but it was at least a million." He also stated that he was certain that he had received $800,000 because he used that amount to fund Innovo, his company in Texas. Lopez argues that because Innovo's annual report listed a "debt" balance of $413,754 during the relevant period when Binet was siphoning off his profits from the CMOR, that is the amount that should be considered Binet's profit. Binet also testified that he recalled approximately $600,000 had been funneled into Innovo by the time it went public. Although the district court noted that Binet "had a lot of things going on at that same time . . . that he was the man in terms of all of this movement of money from one place to another, and I'm not sure that it's totally clear in his mind what he did," the court believed Binet had "made an effort to be truthful in his testimony."

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[11] Neither party was able to obtain complete records from the banks involved, in part due to the lapse of time between the transaction dates in 1987-88 and the filing of the indictment in March 1997. Also, according to Binet, most of the CU1 documents on this particular CMOR transaction were diverted to him and were later destroyed. In addition, information about this transaction did not come to light until after Binet's arrest in 1997.

To the extent that the district court's findings rest on credibility determinations, they command even greater deference than ordinary factual findings. Fed.R.Civ.P. 52(a); *see Johnson v. Zerbst*, 327 U.S. 106, 111-12 (1946). This court may not re-judge credibility and may reverse only if, after reviewing the record, we are left with the firm belief that the district court made a mistake. *Zeige Distributing Co., Inc. v. All Kitchens, Inc.*, 63 F.3d 609, 612 (7th Cir. 1995) (citation omitted). "Congress has mandated this deferential standard of review, *see* 18 U.S.C. § 3742(e), and we do not second-guess the sentencing judge." *United States v. McEntire*, 153 F.3d 424, 431 (7th Cir. 1998) (citations omitted).

The district court calculated the estimated profit at $600,000. This amount was arrived at after hearing Binet testify at an alleged co-conspirator's trial, in addition to three separate sentencing hearings. The court reviewed all of the available documentation concerning the CMOR during the three sentencing hearings and asked questions of both parties in seeking to reconcile the documentation with the testimony. The record indicates the district court's inquiries were sufficiently searching to ensure the probable accuracy of the available evidence. *See United States v. Beler*, 20 F.3d 1428, 1443 (7th Cir. 1994). The district court judge stated repeatedly that "Mr. Binet has been credible in his testimony." Although the district court stated there was sufficient evidence to support a finding of $800,000 or more, the court reduced the amount of loss to $600,000, given the "grossly incomplete" records of the CMOR transaction. The court noted the $413,754 loan amount but, from the documents and

testimony, believed the profit on the $8.8 million CMOR to be more than that.

We are satisfied the district court "correctly applied the guidelines to findings of fact that do not leave us with the definite and firm conviction that a mistake has been committed." *United States v. Jordan*, 890 F.2d 968, 972 (7th Cir. 1989). Based on the evidence available, the district court did not clearly err in determining the estimated profit loss to CU1 was $600,000 on a CMOR transaction involving $8.8 million and in applying that amount to Lopez's sentence.

E. Arbitrary Determination of Binet's Services

Binet received $399,500 during the four years he managed CU1's investment portfolio. Lopez argues the entire amount should be deducted from CU1's losses because the portfolio earned money during every year in question and Binet was worth that much in managing a portfolio of approximately $82 million on average. Of course, this amount was "paid" to Binet through Lopez's manipulations and without the board's knowledge.

The government proposed an offset based on the annualized investment fees for 1988 and 1989, $27,833.60 and $17,858.01 respectively, but divided the figures in half to take into account the amount of time Binet spent "working" at CU1 for personal gain. The defendants proposed fees based on percentage points of the total of net investments for each year, resulting in calculations of approximately $300,000 for 1988, $353,000 for 1989, and $428,000 for 1990.

The district court followed *Schneider* in determining that there should be a certain offset where the defendant provides a service. *See* 930 F.2d at 558.[12] However, as the government noted, when the NCUA, DFI, and ASI came in, they all agreed that CU1 was not being managed well and was involved in numerous questionable investments, in addition to the embezzlement and fraud later discovered. After hearing Binet's testimony, the district court noted the difficulty in quantifying an amount for Binet's services to CU1 in the absence of any records because Binet had so many "projects" going on, it was difficult to separate the time spent on legitimate CU1 investment business.

Binet was not a certified or licensed investment broker or manager nor was he registered with the SEC. The board was never given the opportunity to determine what they might wish to pay him or someone else. The court was concerned that Binet was not licensed as an investment manager and that he involved CU1 funds in higher risk investments, both factors which lowered the value of the services rendered.

The district court's determination of loss under § 2F1.1(b)(1) of the Guidelines is a finding of fact reviewable for clear error only. *United States v. Strozier,* 981 F.2d

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[12] We note that *Schneider* limits this "offset" calculation of loss to fraud cases "where the fraud is discovered or otherwise interrupted before the victim has been fleeced." 930 F.2d at 558. The fraud in the instant case was *not* interrupted or discovered prior to completion of the criminal activity. However, the government does not argue that Binet should not receive an offset for his services; there is no challenge to the offset itself, only to the amount.

281, 283 (7th Cir. 1992). The district court noted that testimony indicated most credit unions do not have salaried investment managers, as was the case with CU1. The court then determined the offset to be one-fifth of the $399,500 (the amount Binet had chosen to "pay" himself); that is, $79,900 for the four-year period. Because there are no precise figures, as in *Schneider*, where the difference between the contract price and the contractor's costs was used as the measure of damages rather than the full contract price, 930 F.2d at 558, the district court, after hearing methods of calculations from both parties, determined the amount based on a percentage of Binet's self-remuneration.

We agree that Binet's services should not be calculated on a par with a licensed professional who does not commit embezzlement or fraud with a client's money. Given the annualized investment fees of $27,833.60 for 1988 and $17,858.01 for 1989, the district court's fee of $19,975 per year is a "reasonable estimate," *Haddon*, 927 F.2d at 952, and is not "outside the realm of permissible computations." *Hassan*, 211 F.3d at 383 (citation omitted).

F. Failure to Reduce Loss by Value of Cars

Lopez makes the same argument here he used in opposing Binet's gain as a measure of loss, again referring us to "Application Note 8(b) to U.S.S.G. § 2F1.1" which is not found in the 1989 Guidelines. We repeat, that note is not applicable to the instant case.

The court stated that the loss amount for sentencing was determined by the original capital outlay for the two cars because the defendants had no right to purchase the

vehicles with CU1 funds. There is no dispute that the original expenditures for the two cars were $20,767 and $19,877. Lopez argues that the trade-in and/or resale value of each car should be deducted from the loss amount. The district court did deduct the trade-in/resale values from the restitution amount, but stated that "the loss was determined by the amount of [CU1] money that was expended to purchase these items or lease them. . . . " The district court did not clearly err in using the purchase price of the cars for sentencing purposes.

G. Employee Bonuses

Binet testified that in February 1990 a payment of $13,852 was made to Charles Wiseman, an employee of CU1. Both Binet and Lopez testified that Wiseman and several other employees assisted in the cover-up of irregularities at CU1 prior to obtaining private insurance. Lopez testified that these bonuses were approved by the board. Although Lopez stated that most or all employees received annual bonuses, the bonuses for these particular employees (and only these employees) were issued on February 28, 1990. The insurance conversion became effective on February 11, 1990. The government maintains the timing of the bonuses to these particular employees indicates the payments were payoffs for assisting with the fraud.

Minutes of the board meetings from December 1986, December 1987, and December 1989 state that employee year-end bonuses were authorized at those times. The district court found that the people involved and the timing indicated the payments were directly related to

the change in insurance. We cannot say the district court committed clear error in making this determination.

H. Restitution Ex Post Facto Claim

Lopez argues that ordering restitution under the MVRA, 18 U.S.C. § 3663A,[13] which requires restitution be ordered "without consideration of the economic circumstances of the defendant," 18 U.S.C. § 3664(f)(1)(A), violates the Ex Post Facto Clause of the Constitution, Art. I, § 9, cl. 3. He asks us to overrule our holding in *United States v. Newman*, 144 F.3d 531, 537 (7th Cir. 1998) (finding that the MVRA applies to cases in which a defendant is convicted on or after April 24, 1996, the date of the enactment of the MVRA, even though the criminal conduct may have occurred prior to April 24, 1996).

Congress amended the Victim and Witness Protection Act ("VWPA") in 1996 in an effort to guarantee restitution to the victims of criminal conduct. *See Newman*, 145 F.3d at 537. The Ex Post Facto Clause prohibits the enactment of a "law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. 386, 390 (1798). In *Newman*, we held that restitution does not qualify as criminal punishment. 145 F.3d at 538; *see also United States v. Black*, 125 F.3d 454, 467 (7th Cir. 1997). We observed in *Newman* that other courts disagree with this finding and the Eighth Circuit, in particular, does not agree with our characterization of restitution under the VWPA. *Id.* at 539.

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[13] Lopez mistakenly refers to the MVRA as 18 U.S.C. § 4663A *et seq.*

Lopez notes the split in the circuits on this issue and asks us to adopt the argument of the Tenth Circuit in *United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999). His argument is misplaced, as *Nichols* states, "[W]e accept the view of the Seventh Circuit [in *Newman*] that the Ex Post Facto Clause does not bar application of the MVRA to a defendant whose criminal conduct occurred before the effective date of the statute and reject the views of the Second, Third, Eighth, Ninth, Eleventh and D.C. circuits to the contrary." 169 F.3d at 1280 n. 9.

We decline to reconsider the holding in Newman.

III. CONCLUSION

Based on the above-stated reasons, we affirm the findings of the district court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: August 17, 2000

BEFORE: Honorable JOEL M. FLAUM, Chief Judge

Honorable HARLINTON WOOD, JR., Circuit Judge

Honorable TERENCE T. EVANS, Circuit Judge

No. 99-1724

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANGEL C. LOPEZ,

Defendant-Appellant

Appeal from the United States District Court for the Central District of Illinois, Urbana Division
No. 97 CR 20014, Michael M. Mihm, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	Criminal No. 97-20014
Plaintiff,	)	Peoria, Illinois
	)	March 23, 1999
vs.	)	
ANGEL LOPEZ,	)	
Defendant.	)	

CONTINUED SENTENCING HEARING

BEFORE:

HONORABLE MICHAEL M. MIHM
United States District Judge

APPEARANCES:

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U.S. District Court Reporter
Central District of Illinois
Proceedings recorded by mechanical stenography, transcript produced by computer

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* * *

[146] was a good deal of travel involved then by the agent on the case, Inspector Berger, to actually move out of the State of Illinois to have to find witnesses in other states and it was just terribly, terribly time consuming.

Finally, because of the approach that the defendants took in their fraud and their deliberate, how should I put it, changing of documents, we were confused on numerous occasions, had to keep going back and reviewing documents again and again and comparing them to

documents we would find later and perhaps in different locations or from other witnesses to determine what the accurate approach was on a particular issue.

THE COURT: All right. Thank you. Mr. Lopez, would you approach the podium with your counsel, please? First of all, the Court adopts the factual findings and guideline application as contained in the pre-sentence report except I have made some changes regarding certain claims, disputes, and those have been reduced to writing.

I'm always uncomfortable in a sentencing like this because it's just so difficult for me to understand how it is that you came to be involved in this. There certainly is nothing in your record to indicate or explain that. I have no reason to doubt that you have made positive contributions to your community and have done a good job raising your family and all that. It's just inexplicable to me.

[147] I realize these things don't begin dramatically. My guess is that this was a process that probably occurred incrementally in terms of your decisions to become involved in this fraud. It was a major fraud and it was a pervasive fraud in terms of what was going on at that credit union. It may be that you would never have gotten involved in this were it not for Mr. Binet. That's possible, may even probable. But that doesn't change anything. A lot of the things that your attorney has said about Mr. Binet in that – at last in that period of time, no one could disagree with him. [Illegible] you're not an unsophisticated man. You knew at some point had to

know, there was a pervasive series of acts here in different ways, money was defrauded from the company, from the credit union.

The idea that you were well trusted is well taken. You were well trusted, I'm sure, by many of the depositors who knew you, by the people who worked there and unfortunately by the board of directors. I think I made some comment about that when I sentenced Mr. Binet, that this board of directors didn't do their job either, that they basically went along with the flow. Whatever was going on at the time, sure, fine, moved, seconded, rubber stamped. And I guess maybe that's the case in most of these boards. You have people from the community who like to be part of something, it's out of the ordinary, they go to the meetings, [148] makes them feel good about themselves, maybe get a couple of free dinners out of it or a trip somewhere for a convention. But, I'll tell you, this case is a good example of it, if you're on a board of directors of a financial institution, you'd better take your responsibilities very seriously. Unfortunately, I don't think – I think what they did here was a combination of putting too much trust in you and Mr. Binet and not putting enough commitment to their obligations to the shareholders there.

In any event, so here I am. I have a 61-year old man who has been involved in a major fraud. The credit union, although we have been – we could fight for the rest of the year about how much money they lost, they lost a lot of money. So it's my duty to sentence you. I don't take any joy in that. At the same time, I don't

apologize for it. It's a good thing this case was prosecuted. It's a good thing that you're standing here to be sentenced.

I do have a problem with the Government's explanation for why it took so long to bring this case. I don't – I'm not doubting what you said and I don't mean to put you on the spot other than, as I've said other times there is something wrong with this system if it takes that long for this kind of case or any case to be investigated and a decision made as to prosecution. It's just too long. And I don't know what the answer is. If it means hiring more [149] people, hiring more U.S. Attorneys or hiring more investigators or hiring investigators with different degrees or accountants or whatever, I don't know. All I'm saying is that when an indictment doesn't occur until 1997 regarding incidents that occurred in 1988 and '89, there's something wrong.

I do believe that the Government did benefit to some degree from the information that you gave them. Your attorney's representation of that benefit may have been a little bit overstated, but I think there was some value that came from it.

I also want to make a point that this sentencing hearing, it's not the longest one I've had, but it's certainly one of the most difficult in the sense of making a good faith effort to resolve the objections that have been made based on an understanding of the facts and the application of law to those facts.

There is a temptation in a situation like this to get irritated with the defense attorney because it is so time consuming, but I'm not irritated by this. The law was

never meant to be just efficient in every case. Not all cases qualify for a one hour sentencing hearing. I think you have been very well served by your attorneys in this case in terms of not only the attention that they have given to the matter but also the obvious degree to which they have familiarized [150] themselves with all of the exhibits and history of the case. I don't know how you could have been more aggressively represented and that's certainly not something I would hold against you.

Concerning the question of restitution, as your counsel has indicated – and I didn't have the case name in my head when I asked the question, but I was pretty confident that there was a Seventh Circuit case that had addressed this and I do appreciate the fact that you brought that to my attention even though it's against the interests of your client because, as an officer of the Court, you have a duty to do that.

Regarding the issue of restitution, I don't believe that I have the freedom that I would have had prior to the application of this act to make decisions on the basis of your – what appears is your ability to pay. That's not all bad. In fact, the Mahoney case that I mentioned earlier was out of my court where a guy had stolen several hundred thousand dollars from a bank and I ordered him to pay full restitution even though it appeared he couldn't do it on the idea that hey, I don't know what's going to happen tomorrow. Maybe he'll win the lottery tomorrow. Maybe he has some relative who will die and leave him a lot of money. He has an obligation to pay that money. If he is not able to pay it, there is no way the Court can force him to pay it. But [151] at that time the Seventh Circuit said that's not the right approach and I

had a duty to determine what reasonably could be expected to be repaid. I think in part because of that case and others like it, Congress decided they did not want that situation to stay as it was and so they passed the law that they did.

Taking all of these various things into consideration, the length of time – I should say the delay between the discovery of these events and the prosecution in some respects the assistance you gave to the Government – at the same time, I also believe there were things you didn't tell them that you were aware of and should have told them and didn't until they were discovered somewhere else – the gravity of the crimes involved, all of the things that have been taken into account by the guidelines, this is the sentence of the Court.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Angel Lopez, is hereby committed to the custody of the Bureau of Prisons for a term of 38 months. It is ordered further that you pay, pursuant to the mandatory Victim Restitution Act, you pay restitution to Credit Union 1 or its bonding company in the amount of $1,029,867.00. That restitution is ordered payable immediately. Of course you won't be able to pay it immediately, but the order does become effective immediately.

[152] Upon release from imprisonment, you shall be placed – strike that. The Court finds the defendant does not have the ability to pay a fine either immediately or through installment payments due to the restitution obligation.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of *three years*. Within 72 hours of release from the Bureau of Prisons, you shall report in person to the probation office in the district to which you are released.

The Court finds that you present a low risk of future substance abuse and waives the mandatory drug testing provision.

In addition to the standard conditions of supervision, you shall comply with the following special conditions.

Number one: You shall not incur any new debts or open any additional lines of credit in excess of $250.00 without the prior approval of the probation officer.

Number two: You shall provide the probation officer access to any requested financial information, including both your business and personal income tax returns.

Number three: You shall notify your employer of your conviction and allow the probation officer to verify that disclosure. That's true in terms of your present [153] employer and any employer you may have during the period of supervision.

Number four: You shall not own, purchase or possess a firearm, ammunition or other dangerous weapon.

It is further ordered that you pay a special assessment to the United States in the amount of $50.00 and that special assessment is due immediately. Was there a waiver of appeal in this case?

MR. FOSTER: No, sir.

THE COURT: You do of course have the right to file a notice of appeal in this case. If it is your wish to appeal, I instruct you that that notice of appeal must be filed with the Clerk of the Court within ten days of today's date. Your attorneys have an absolute responsibility to file that notice of appeal for you if it is your wish to appeal.

I will recommend to the Bureau of Prisons that you serve your sentence in a facility – in a minimum security facility as close to your family as possible. And I have no problem recommending Eglin Air Force base to be the place to which you will report. Does the Government have any objection to voluntary surrender?

MS. FROOMAN: No, Your Honor.

THE COURT: Alright. I could order you to be taken into custody now. The alternative is that you leave here, you go home, and then on a date certain you appear at [154] the place you are to begin your sentence. I assume that's what you want.

MR. LOPEZ: Yes, if I could.

THE COURT: I'm going to set your voluntary surrender date at April 19, Monday, April 19. It will be your duty to get to that place on your own at your own expense. If you don't show up there when you're supposed to, you will be considered as being on escape status. Do you understand? And if you haven't heard by somebody before April 12, which is a week ahead of time, be sure and contact your probation people and find out where it is you are to report.

Now between now and April 19, all of the conditions of bond which have been in place will continue to be in

place. If it comes to the Court's attention that you have violated any of the conditions of bond, you will be arrested immediately. Do you understand?

Okay. I don't know. Your lawyer has painted a pretty grim picture when you come out of prison. I don't know. That may be correct. It may not be. It seems to me you have many talents and I still have some confidence that you will be able to find good employment when you come out. It won't be easy, but good luck.

MR. FOSTER: Judge, on this voluntary surrender, what has been my experience, at least with the Florida [155] prisons, is that the designation sometimes takes longer. I would ask, Judge, if you would consider having him report by notice. And what happens, he gets classified and the marshal's service gives him a notice, tells him where he has been designated and when to show up. Because he may go to Eglin and they may say "Hey, we don't have room for you, you need to go to" –

THE COURT: Well, I prefer not to do it that way. Obviously if they haven't determined where it is he is to report, then I would be willing to change the surrender date, but I'm not willing to structure it the way you have requested.

MR. FOSTER: And Judge, for the record, I am objecting to the application of the mandatory restitution. There is a split in the circuits. This circuit does hold it's binding, but the Eighth Circuit, for example, does not say it's ex post facto, so I would like to register that objection.

THE COURT: So noted. Anything else?

MR. FOSTER: Just one other thing. Would the Court consider an appeal bond for Mr. Lopez?

THE COURT: Well, the requirements of an appeal bond are that he not be a risk of flight or a danger to the community and that there is an issue or issues in the case that are not probably going to be overturned but where there [156] is enough of a serious question about reversal that it would call into question whether or not he would actually serve time in prison before – I mean enough time in prison that would fill in the time between the time he surrenders and the time that an appeal is over.

I did think about this this morning and considered and went through the issues that we have addressed and I don't believe I can justify a finding that the third ingredient has been met.

MR. FOSTER: I understand, Judge. I think that if we prevailed on that proffer issue, on that qualified immunity issue, I think that that knocks the sentence potentially way down and I don't know – I know how long it takes to get appeals out of the Eleventh Circuit. It's a real long time. I don't know what the turn-around is here. It could be a year or more.

THE COURT: I think it's usually less than a year, unless those issues – I mean it could be. As I indicated, you have obviously raised a lot of questions, but I don't feel that the issues involved or the rulings thereon, either taken separately or together, are so likely to be overturned on appeal or, if they are, likely that they would cause enough of a change in the Court's ruling that it would be appropriate to do that, so I'm going to deny that request.

MS. FROOMAN: There are counts to be dismissed, [157] Your Honor, Counts 2 through 7, and we make that motion.

THE COURT: Those counts are dismissed. Anything else?

MR. LOPEZ: May I say something to you, Judge? Thank you for listening to my lawyers and giving them a chance to speak.

THE COURT: Not at all. That's what we're supposed to do. Thank you.

MR. FOSTER: Judge, for the record, will all the exhibits be deemed admitted? I'll deal with the clerk and all the exhibits will be deemed admitted?

THE COURT: Right.

*** HEARING CONCLUDED ***

CERTIFICATE

I, KAREN S. HANNA, certify that the foregoing transcript constitutes a true and accurate transcript of the original shorthand notes of the proceedings had at the time and place aforesaid before the HONORABLE MICHAEL M. MIHM, U.S. District Judge.

/s/ Karen S. Hanna 4-8-99

Karen S. Hanna, CSR Date

License #084-001760

United States District Court

Central District of Illinois

UNITED STATES OF AMERICA

v.

Angel C Lopez

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 2:97CR20014-002

J. Steven Beckett and Todd Foster
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) I

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 371	Conspiracy to Embezzle and Misapply Credit Union Funds & Connspiracy [sic] to Execute a Scheme to Defraud	02/11/1990	I

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[X] Count(s) II through VII are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
271-34-5092

Defendant's Date of Birth:
02/27/1938

Defendant's USM No.:
11092-026

Defendant's Residence Address:
28808 Hanging Moss Loop

Wesley Chapel FL 33543

Defendant's Mailing Address:
28808 Hanging Moss Loop

Wesley Chapel FL 33543

03/23/1999
Date of Imposition of Judgment

/s/ Michael M. Mihm
Signature of Judicial Officer

Michael M. Mihm
U.S. District Judge
Name & Title of Judicial Officer

March 25, 1999
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **38 month(s)**.

[X] The court makes the following recommendations to the Bureau of Prisons:

That the defendant be placed at a minimum security camp nearest his family and at Eglin Air Force Base, if possible.

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ a.m./p.m. on _____.
[ ] as notified by the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[X] before 2 p.m. on **04/19/1999**.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s) .

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[X] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision – Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not incur any new debts or open any additional lines of credit in excess of $250 without prior approval of the probation officer. 2. Defendant shall provide the probation officer access to any requested financial information including both his business and personal income tax returns. 3. Defendant shall notify his present and future employers of his conviction and allow the U.S. Probation officer to verify said disclosure. 4. Defendant shall not own,

purchase, or possess a firearm, ammunition, or other dangerous weapon.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 50.00	$	$ 1,029,867.00

[ ] If applicable, restitution amount

ordered pursuant to plea agreement..... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapter 109A, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

[X] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Credit Union One	$1,029,867.00	$1,029,867.00	
Totals:	$1,029,867.00	$1,029,867.00	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than ____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. If the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except

those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 21

Criminal History Category: I

Imprisonment Range: 37 to 46 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 7,500.00 to $ 2,102,086.00

[X] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 1,029,867

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110,

110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

---

18 U.S.C. § 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant –

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense –

(A) Return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to –

(i) the greater of –

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim –

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance of proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense –

(A) that is –

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that –

(A) The number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

THE CONSTITUTION OF THE UNITED STATES

ARTICLE I, Section 9.3

No Bill of Attainder or ex post facto Law shall be passed.

Supreme Court
FILED
MAR 7 2001
CLERK

No. 00-1086

In the Supreme Court of the United States

ANGEL C. LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

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QUESTIONS PRESENTED

1. Whether, in sentencing petitioner for embezzlement under the Sentencing Guidelines, the district court properly determined the amount of the victim's loss by reference to the gains realized by petitioner and his co-conspirator.

2. Whether the Ex Post Facto Clause of the United States Constitution, Article I, Section 9, Clause 3, bars application of the provisions of the Mandatory Victims Restitution Act of 1996, 18 U.S.C. 3663A, 3664 (Supp. IV 1998), to offenses committed before the Act's effective date.

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In the Supreme Court of the United States

No. 00-1086

ANGEL C. LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 222 F.3d 428.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27) was entered on August 17, 2000. A petition for rehearing was denied on October 6, 2000. The petition for a writ of certiorari was filed on January 4, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea, petitioner was convicted in the United States District Court for the Central

District of Illinois of conspiracy to embezzle from, misapply the funds of, and defraud a credit union, in violation of 18 U.S.C. 371. He was sentenced to 38 months' imprisonment and was ordered to pay $1,029,867 in restitution to the credit union. The court of appeals affirmed. Pet. App. 1-26.

1. Petitioner was the president of Credit Union One, a state-regulated credit union that also was within the regulatory authority of the National Credit Union Administration. Pet. App. 2. Between 1986 and 1992, petitioner conspired with Richard Binet, the chairman of the board of Credit Union One, to defraud the credit union in various ways. *Id.* at 2-7. In February 1988, petitioner and Binet used $8.8 million of the credit union's funds to purchase a financial instrument; as a result of the transaction, petitioner and Binet acquired a 20% interest in the instrument without investing any of their own funds. See *id.* at 6, 15. After the financial instrument was sold for a substantial profit, petitioner and Binet retained $800,000 or more, while returning the $8.8 million and some of the profit to the credit union. See Gov't C.A. Br. 16-19.

2. Pursuant to a plea agreement, petitioner pleaded guilty to the conspiracy offense, and the government agreed to move to dismiss the other six counts of the indictment. 12/29/97 Plea Agreement para. 1. The plea agreement did not address the subject of restitution. The agreement stated, however, that with respect to Sentencing Guidelines (Guidelines) § 2F1.1, which provides for an enhancement of the defendant's offense level based on the loss to the victim, "[t]he amount of funds for which [petitioner] could be held responsible could be as high as more than $1.5 million." 12/29/97 Plea Agreement para. 11.B.

At sentencing, the district court applied the 1989 version of the Sentencing Guidelines. Pet. App. 9 n.5.[1] Applying Guidelines § 2F1.1, the provision applicable to fraud and deceit, the court began with a base offense level of 6. Pet. App. 8. The court added 11 levels for a loss of $1,051,043. *Id.* at 9. In calculating the "loss" that formed the basis for the 11-level adjustment under Guidelines § 2F1.1(b)(1), the district court included $600,000 of profit that petitioner and Binet had retained from the $8.8 million investment of credit union funds. See Pet. App. 9 n.6.[2] The court also added two offense levels for more than minimal planning; added two levels for abuse of a position of public or private trust; added two levels for obstruction of justice based on petitioner's false grand jury testimony; and subtracted two levels for acceptance of responsibility. *Id.* at 9. Those calculations yielded a total offense level of 21 and a sentencing range of 37-46 months' imprisonment. *Ibid.* The court sentenced petitioner to 38 months' imprisonment. *Ibid.*

With respect to restitution, the district court applied the Mandatory Victims Restitution Act of 1996 (MVRA), 18 U.S.C. 3663A, 3664 (Supp. IV 1998). See Pet. App. 9. The MVRA provides that in sentencing a defendant convicted of certain offenses, including fraud, see 18 U.S.C. 3663A(c)(1)(A)(ii) (Supp. IV 1998), "the court shall order, in addition to * * * any other penalty authorized by law, that the defendant

---

[1] The plea agreement reflected the parties' view that the 1989 Guidelines manual was applicable to this case. See 12/29/97 Plea Agreement para. 11.

[2] The presentence report (PSR) had recommended that the court include $800,000 from that transaction in calculating the victim's loss. See Gov't C.A. Br. 19-20; PSR paras. 43-44.

make restitution to the victim of the offense." 18 U.S.C. 3663A(a)(1) (Supp. IV 1998). The MVRA further provides that "the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. 3664(f)(1)(A) (Supp. IV 1998). In determining the payment schedule, however, the MVRA requires that the court consider "the financial resources and other assets of the defendant." 18 U.S.C. 3664(f)(2)(A) (Supp. IV 1998). Congress directed that the MVRA "shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act [April 24, 1996]." 18 U.S.C. 2248 note (Supp. IV 1998).

The presentence report (PSR) stated that petitioner had a net worth of $682,238 and a monthly salary income of $4,948. PSR para. 84. At sentencing, the district court reviewed petitioner's objections to the PSR's calculation of his assets and found petitioner's net worth to be $572,888. 3/23/99 Sentencing Tr. 128-131. In reference to the MVRA's mandatory restitution requirement, the court stated, "I don't believe that I have the freedom that I would have had prior to the application of this act to make decisions on the basis of your—what appears is your ability to pay." Pet. App. 33. The court ordered petitioner to pay $1,029,867 in restitution to Credit Union One or its bonding company. *Id.* at 34.

3. The court of appeals affirmed petitioner's conviction and sentence. Pet. App. 1-26.

a. The court of appeals held that the district court had not committed any clear error in including $600,000 of the conspirators' gain, realized from their illicit

purchase of a financial instrument with Credit Union One funds, in its calculation of "loss" under Guidelines § 2F1.1. Pet. App. 15-18. Petitioner argued that the credit union had suffered no "loss" on that transaction and that no amount should have been included in the sentencing calculation with respect to that transaction. *Id.* at 17. The court of appeals rejected that contention, holding that "any estimated profit which Binet made on the investment was correctly determined to be a loss to [Credit Union One]" because "Binet's profit from this particular transaction would not have been realized without his illegal use of [Credit Union One's] funds." *Ibid.* The court also held that the gain realized by Binet was properly attributable to petitioner because it arose out of "jointly-undertaken criminal activity that was reasonably foreseeable by the defendant." *Ibid.* (quoting Guidelines § 1B1.3 comment. (n. 1)).

b. Petitioner also contended that the district court should have applied the Victim and Witness Protection Act of 1983 (VWPA), 18 U.S.C. 3663—the predecessor to the MVRA—in determining whether and how much restitution should be awarded in this case. Pet. App. 25-26. Under the VWPA, the decision whether to award restitution is discretionary, and the district court must consider the economic circumstances of the defendant before ordering restitution. See 18 U.S.C. 3664(a). Petitioner contended that application of the MVRA to this case violated the Ex Post Facto Clause, because it increased the punishment applicable to his offense insofar as it required entry of a restitution order without regard to his economic circumstances. See Pet. App. 25. The court of appeals rejected that claim, relying on its prior decision in *United States* v. *Newman*, 144 F.3d 531 (7th Cir. 1998), which held that restitution under the MVRA is an equitable remedy rather than

criminal punishment and therefore is not subject to the Ex Post Facto Clause. See *id.* at 537-539; Pet. App. 25-26. The court acknowledged that its resolution of the Ex Post Facto Clause issue conflicted with rulings of other circuits, see *id.* at 25, but it "decline[d] to reconsider the holding in [*Newman*]," *id.* at 26.[3]

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the court of appeals misapplied Sentencing Guidelines § 2F1.1 by treating the conspirators' $600,000 profit from their purchase of a financial instrument with credit union funds as a "loss" to the credit union. That claim lacks merit and does not warrant this Court's review.

Petitioners purchased the financial instrument with $8.8 million that belonged to Credit Union One. Under traditional equitable doctrine, the entire profit therefore belonged to the credit union, and the conspirators held their share of the investment in constructive trust for the credit union. When they kept profit from the transaction, petitioners appropriated funds that belonged to the credit union, and thus caused an actual "loss" to the credit union in that amount. See *Counihan* v. *Allstate Ins. Co.*, 194 F.3d 357, 361 (2d Cir.

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[3] The court of appeals also rejected petitioner's contentions that the district court had erred by (1) enhancing petitioner's sentence in violation of his immunity proffer, Pet. App. 10-13; (2) enhancing his sentence for obstruction of justice, *id.* at 13-15; (3) basing the estimated gain to the conspirators on unreliable and contradictory evidence, *id.* at 18-21; (4) determining an arbitrary value for services rendered to the credit union by Binet, *id.* at 21-23; (5) failing to reduce the loss incurred by Credit Union One to reflect the resale value of the cars recovered by the credit union, *id.* at 23-24; and (6) including in the loss figure bonuses paid to certain credit union employees, *id.* at 24-25. Petitioner does not press those arguments in this Court.

1999); *United States* v. *Briscoe*, 65 F.3d 576, 583-584 (7th Cir. 1995); *Amalgamated Clothing & Textile Workers* v. *Murdock*, 861 F.2d 1406, 1410-1411 (9th Cir. 1988).

Petitioner asserts (Pet. 7-8) that the court of appeals' decision conflicts with the decisions of the Fourth and Tenth Circuits in *United States* v. *Marcus*, 82 F.3d 606 (4th Cir. 1996), and *United States* v. *Galbraith*, 20 F.3d 1054 (10th Cir.), cert. denied, 513 U.S. 889 (1994). In fact, no conflict exists. Those cases simply state that a defendant's gain from criminal activity is not, in and of itself, a basis for an enhancement under Guidelines § 2F1.1 in the absence of any loss to the victim. See Pet. 7; *Marcus*, 82 F.3d at 608; *Galbraith*, 20 F.3d at 1060. Neither of those cases, however, involved the situation presented here, where the conspirators have kept a gain from a misappropriated corporate opportunity, and neither case addressed the question whether a fiduciary's failure to disgorge profits that rightfully belong to the corporation causes a "loss" to the victim.[4]

Even if a circuit conflict on this question existed, the case would not warrant this Court's review. In directing the Sentencing Commission "periodically [to] review and revise" the Sentencing Guidelines, 28 U.S.C. 994(*o*), "Congress necessarily contemplated that the Commission would periodically review the work of the

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[4] Petitioner also asserts (Pet. 7-8) that the court of appeals' decision conflicts with the Seventh Circuit's ruling in *United States* v. *Vitek Supply Corp.*, 144 F.3d 476 (7th Cir. 1998), cert. denied, 525 U.S. 1138 (1999). An intracircuit conflict is not an appropriate ground for invocation of this Court's certiorari jurisdiction. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, *Vitek Supply* did not present the question whether a defendant's gain from misappropriation of a corporate opportunity is an appropriate measure of the loss to the corporate victim.

courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). The Commission is also authorized to determine whether and to what extent Guidelines amendments that have the effect of reducing sentences will be given retroactive application. *Ibid.*; see 28 U.S.C. 994(u). Because the Commission has been given primary responsibility for the resolution of conflicts in authority involving the application of the Guidelines, this Court's review would not be warranted even if the Seventh Circuit's decision in fact conflicted with rulings of other courts of appeals.[5]

2. Petitioner argues (Pet. 8-9) that the MVRA is a penal statute, and that the Ex Post Facto Clause bars the retroactive imposition of a mandatory restitution order without regard to a defendant's ability to pay. The courts of appeals are divided on that question. The majority view is that restitution under the MVRA is

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[5] In the court of appeals, petitioner relied (see Pet. App. 15-16) on Application Note 8(b) to Guidelines § 2F1.1. Application Note 8(b) states that "if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan." Guidelines § 2F1.1, comment. (n.8(b)). As the court of appeals explained, however, petitioner was sentenced under the 1989 Guidelines, and Application Note 8(b) was not added until 1991. See Pet. App. 8-9 & n.5, 15-16. In any event, that Application Note—which by its terms governs "fraudulent loan application and contract procurement cases"—does not speak to the question whether a corporate fiduciary's failure to disgorge profits made from a misappropriated corporate opportunity causes a "loss" to the victim for purposes of Guidelines § 2F1.1. In this Court, petitioner does not rely on Application Note 8(b).

criminal punishment subject to the Ex Post Facto Clause. See *United States* v. *Edwards*, 162 F.3d 87, 89-92 (3d Cir. 1998); *United States* v. *Siegel*, 153 F.3d 1256, 1258-1260 (11th Cir. 1998); *United States* v. *Bapack*, 129 F.3d 1320, 1327 n.13 (D.C. Cir. 1997); *United States* v. *Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997); *United States* v. *Baggett*, 125 F.3d 1319, 1322 (9th Cir. 1997); *United States* v. *Thompson*, 113 F.3d 13, 15 n.1 (2d Cir. 1997). Along with the Seventh Circuit, the Tenth Circuit has concluded that restitution is not criminal punishment subject to the constraints of the Ex Post Facto Clause. See *United States* v. *Nichols*, 169 F.3d 1255, 1279-1280, cert. denied, 528 U.S. 934 (1999).

That conflict in authority does not warrant this Court's review. The question whether the MVRA may be applied to criminal offenses committed before the date of its enactment is of diminishing significance in criminal cases generally. That question has relevance only to persons who committed their offenses before April 24, 1996, when Section 3663A and the new Section 3664 became effective. The number of offenders potentially affected by the question presented here is therefore limited. This Court recently has denied review in two other cases from the Seventh Circuit raising the same Ex Post Facto Clause question that is presented here. See *United States* v. *Bach*, 528 U.S. 950 (1999) (No. 99-127); *United States* v. *Stoecker*, 121 S. Ct. 885 (2001) (No. 00-6007).

It is unlikely that the district court would have imposed a less substantial restitution obligation upon petitioner if the court had applied the VWPA rather than the MVRA. Petitioner possessed assets of more than $500,000 at the time of sentencing (see p. 4, *supra*), and he might have been ordered to pay the entire amount of the credit union's loss even under the old statute. See

United States v. *Ahmad*, 2 F.3d 245, 247 (7th Cir. 1993) (Under the VWPA, "[w]hen there is doubt about ability to pay, the court should order full restitution.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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